

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

VIRGILITO V. VIRGILITO

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

KARA L. VIRGILITO, NOW KNOWN AS KARA L. CLARK, APPELLEE,

V.

DAVID A. VIRGILITO, APPELLANT.

Filed August 7, 2012. No. A-11-621.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge.
Affirmed as modified.

Barry S. Grossman for appellant.

Kara L. Clark, pro se.

INBODY, Chief Judge, and MOORE, Judge, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

David A. Virgilito appeals from a decree of dissolution entered by the district court, which dissolved his marriage to Kara L. Virgilito, now known as Kara L. Clark (Kara). On appeal, David assigns error to the determination of his child support obligation. Specifically, David asserts that the district court erred in failing to deduct David's voluntary retirement contributions and child support for another child from his income and that the district court erred in failing to deviate from the Nebraska Child Support Guidelines in determining his obligation. For the reasons set forth below, we affirm as modified.

BACKGROUND

David and Kara married on September 24, 1999. The parties have two minor children. On June 11, 2010, Kara filed a complaint for dissolution of marriage in the Sarpy County District Court. On April 27, 2011, the matter came before the court for trial. The parties had agreed upon a property settlement and parenting plan, which plan awarded Kara custody of the children and

provided parenting time to David. The sole issues before the court were child support and alimony.

Kara is a self-employed hairdresser renting space within a salon. David has been employed by Nebraska Furniture Mart since February 2011 and had previously worked as a painting subcontractor and an independently employed painter. Because neither party challenges the determination of their total monthly income by the district court, we need not detail the evidence concerning their earnings. The district court set Kara's total monthly income at \$2,072.56 and David's at \$3,033.33. David becomes eligible for health insurance in June 2011, and the extra cost to cover the children is \$140 per month. David was enrolled in a 401K plan with his employer, which plan was noted on his paystub.

David submitted a list of monthly expenses as an aid to the court in determining whether there should be a departure from the Nebraska Child Support Guidelines. This exhibit showed that David's average monthly living expenses are \$2,351 and that his net monthly income is \$2,000. This list of expenses does not include David's obligation for temporary support for the children of this marriage in the sum of \$525, for which he was in arrears in the sum of \$2,972.27 at the time of trial, but it does include \$150 as "other child support." David testified that the other child support is for a daughter who he "thinks" is 11 years old and that there is an order of child support for her. David later testified that action had just recently been taken by the child support enforcement office compelling him to provide "protection" for this child, even though he had surrendered visitation and contact with the child, and that David had hired an attorney to appear and file pleadings in this action. No child support order for this other child was submitted to the court.

On June 6, 2011, the district court entered a decree of dissolution of marriage. The court awarded sole custody of the children to Kara, as per the parenting plan, and ordered David to pay child support of \$746.92 per month, which amount included a deduction for the cost of health insurance he was ordered to provide for the children. The court noted that David had requested a deviation from the guidelines based upon the proposition that application of the guidelines would be unjust or inappropriate. However, the court found that deviation from the guidelines was not warranted based upon the evidence. The court declined to award alimony to Kara after considering the relevant evidence and statutory factors. Finally, the court divided the marital assets and debts as settled upon by the parties in their agreement.

Thereafter, David filed a motion for new trial alleging that by not deviating from the guidelines, the court ordered him to pay an amount that was "unreasonable, oppressive and inequitable." The district court overruled David's motion for new trial. David subsequently filed a motion to vacate or modify the judgment which was also overruled. David filed this timely appeal.

ASSIGNMENT OF ERROR

David assigns, restated, that the district court erred in calculating his child support obligation in three respects: (1) the court did not deduct David's actual voluntary retirement contributions, (2) the court did not deduct David's child support obligation of \$150 per month for another child, and (3) the court abused its discretion in failing to deviate from the guidelines to avoid an unjust or inappropriate result.

STANDARD OF REVIEW

In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2009).

ANALYSIS

The district court ordered David to pay child support in the amount of \$746.92 per month for two children and \$487.34 per month for one child. The only deductions made from David's income were for federal, state, and FICA taxes. The court did provide David with credit for the \$140 cost to provide health insurance for the children.

Deductions.

David has assigned error to the district court's calculation of his child support obligation without deductions for his voluntary retirement contribution or for child support for his other child.

The trial court did not make specific findings of fact regarding these two deductions, and the record does not reflect that either party asked the court to make specific findings of fact. See, Neb. Rev. Stat. § 25-1127 (Reissue 2008); *Brook v. Brook*, 234 Neb. 968, 453 N.W.2d 438 (1990).

The guidelines allow for a deduction for actual voluntary retirement contributions not to exceed 4 percent of the gross income from employment. Neb. Ct. R. § 4-205(C). David testified that he was enrolled in a 401K plan with his employer, and his paystub was submitted into evidence depicting a \$41.54 contribution. David is paid every 2 weeks; therefore, the monthly amount of this contribution is \$90. This amount does not exceed 4 percent of David's gross income. The district court erred in not allowing this deduction.

The guidelines also provide deductions for child support of other children. Section 4-205(D) allows a deduction for child support previously ordered for other children. Section 4-205(E) provides that, subject to Neb. Ct. R. § 4-220, credit may be given for biological or adopted children for whom the obligor provides regular support. Section 4-220 provides:

An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgment of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.

The record before us does not clearly establish that an order of child support has previously been ordered for this other child. No court order establishing child support for this other child was offered in evidence. David did not testify when any such order was entered. His testimony suggested that the attempt to collect child support for this child was a recent event and that some type of action was pending. David thought this other child was 11 years old, but he did

not testify to a date of birth. We note that the children of the marriage before us were approximately 16 and 11 years old at the time of trial. The record also fails to support giving David credit for this other child under § 4-205(E), because there was no evidence that David actually provided regular support for this child at the time of trial. Given the lack of evidence to support David's claim that he is entitled to a deduction or credit for child support for another child, we cannot say that the district court abused its discretion in failing to allow such deduction or credit in its child support calculation.

Deviation From Guidelines.

David also alleges that the trial court abused its discretion in failing to deviate from the guidelines. David alleged that a departure was necessary for him to function and operate economically. In support of his argument, David submitted a list of his monthly expenses.

In general, child support payments should be set according to the guidelines, which compute the presumptive share of each parent's child support obligation. *Clarborn v. Clarborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). The guidelines are applied as a rebuttable presumption, and all orders for child support shall be established under the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption. *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007); Neb. Ct. R. § 4-203. A court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. *State on behalf of A.E., supra*; § 4-203(E). Deviations from the guidelines must take into consideration the best interests of the child. *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009); § 4-203(E).

We conclude that David did not provide sufficient evidence to rebut the presumption that the guidelines should be applied. Support of one's children is a fundamental obligation which takes precedence over almost everything else. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004). The paramount concern and question in determining child support is the best interests of the child. *Id.* David made no indication of how a deviation from the guidelines would be in his children's best interests and focused his argument solely on the impact the child support obligation has on him. Our review of the record leads us to conclude that it would not be in the children's best interests to deviate from the guidelines.

Because David did not provide sufficient evidence to rebut the presumption that the guidelines should be applied, the trial court did not err in entering a child support order that did not deviate from the guidelines.

CONCLUSION

The district court did not abuse its discretion in finding that David was not entitled to a deduction for child support previously ordered or in finding that a deviation from the guidelines was unwarranted. The district court did abuse its discretion in failing to deduct David's voluntary retirement contributions, and we have modified the child support calculation and attached the worksheet to this opinion as appendix A. David's child support obligation is modified to the sum of \$728.03 for two children and \$473.63 for one child.

AFFIRMED AS MODIFIED.

BASIC NET INCOME AND SUPPORT CALCULATION

	<u>Mother</u>	<u>Combined</u>	<u>Father</u>
1. Total monthly income from all sources	\$2,072.56		\$3,033.33
Total monthly income (non-taxable)	\$ 0.00		\$ 0.00
	2	Exemptions	2
2. Deductions			
a. Taxes	\$ 100.01		\$ 346.01
b. FICA	\$ 117.10		\$ 171.38
c. Retirement	\$ 0.00		\$ 90.00
d. Child support previously ordered for other children	\$ 0.00		\$ 0.00
e. Regular support for other children	\$ 0.00		\$ 0.00
f. Total deductions	\$ 217.10		\$ 607.39
3. Monthly net income (line 1 minus line 2f)	\$1,855.46		\$2,425.94
4. Combined monthly net income		\$ 4,281.40	
5. Combined annual net income (line 4 times 12)		\$51,376.80	
6. Percent contribution of each parent (line 3, each parent, divided by line 4)	43.34%		56.66%
7. Monthly support from table 1		\$ 1,392.00	
8. Health insurance premium	\$ 0.00		\$ 140.00
9. Total obligation (line 7 plus 8)		\$ 1,532.00	
10. Each parent's monthly share (line 9, times line 6, for each parent)	\$ 663.97		\$ 868.03
11. Each parent's credit for health premium actually paid (line 8)	\$ 0.00		\$ 140.00
12. Each parent's final share of the obligation (line 10 minus line 11)	\$ 663.97		\$ 728.03

NUMBER OF CHILDREN CALCULATION

	<u>Mother</u>	<u>Combined</u>	<u>Father</u>
1. Percent contribution of each parent	43.34%		56.66%
2. Health insurance premium	\$0.00	\$140.00	\$140.00

	Column A	Column B	Column C	Column D	Column E	Column F
Number of children	Table Amount	Total Obligation	Mother's monthly share of total obligation	Father's monthly share of total obligation	Mother's final share of obligation	Father's final share of obligation
Two	\$1,392.00	\$1,532.00	\$663.97	\$868.03	\$663.97	\$728.03
One	\$ 943.00	\$1,083.00	\$469.37	\$613.62	\$469.37	\$473.63